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Gateway Care Center and 1199 SEIU Healthcare Workers East, New Jersey Region. Case 22–CA–28708

November 19, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

On December 28, 2009, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, to modify his recommended remedy,³ and to adopt the recommended Order as modified.⁴

¹ Member Pearce is recused and has taken no part in considering this case.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent unlawfully refused to execute a collective-bargaining agreement, we do not rely on *Miron & Sons Laundry*, 338 NLRB 5, 12 (2002), cited by the judge. Instead, we rely on *Windward Teachers Assn.*, 346 NLRB 1148 (2006), and *Alexandria Manor*, 317 NLRB 2 (1995).

The Respondent's request for oral argument is denied, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

³ The judge failed to provide any make-whole relief for the Respondent's failure to execute and implement the contract. We shall modify the judge's remedy and recommended Order and substitute a new notice to include a make-whole provision. See, e.g., *Brookville Health Care Center*, 337 NLRB 1064, 1068 (2002); *West Co.*, 333 NLRB 1314, 1317 (2001). In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we shall require that any monetary award shall be paid with interest compounded on a daily basis.

⁴ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

AMENDED REMEDY

In addition to the relief recommended by the administrative law judge, we shall order the Respondent to give retroactive effect to the collective-bargaining agreement and to make whole the unit employees for any losses attributable to its failure to execute the agreement, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest shall be compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Gateway Care Center, Eatontown, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following after paragraph 2(a) and reletter the subsequent paragraphs.

“(b) Give the agreement retroactive effect to March 14, 2008.

“(c) Make unit employees whole for any loss of earnings and other benefits they have suffered as a result of the Respondent's failure to execute the agreement, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), as set forth in the amended remedy section of the decision.

“(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay, if any, due pursuant to this Order.”

2. Substitute the following for relettered paragraph 2(e).

“(e) Within 14 days after service by the Region, post at its Eatontown, New Jersey facility, copies of the attached notice marked “Appendix.”⁵ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 2008.”

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. November 19, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to execute the written collective-bargaining agreement with 1199 SEIU Healthcare Workers East, New Jersey Region, agreed to by the Union and us on March 14, 2008, and submitted for signing on August 4, 2008.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL execute the February 15, 2007 through February 14, 2011 collective-bargaining agreement agreed to by the Union and us, attaching the chart summarizing health care insurance provided through United Health Plus.

WE WILL give the agreement retroactive effect to March 14, 2008.

WE WILL make unit employees whole for any loss of earnings and other benefits they have suffered as a result of our failure to execute the agreement, with daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

GATEWAY CARE CENTER

Laura Elrashedy, Esq., for the General Counsel.

Neil M. Frank, Esq. and Patricia Pastori, Esq. (Frank & Associates, PC), of Farmingdale, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was heard in Newark, New Jersey, on June 9, 2009. The complaint alleges that Respondent, in violation of Section 8(a)(5) and (1) of the Act, has refused to execute a written collective-bargaining agreement. Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent on September 14, 2009, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a nursing home with an office and place of business in Eatontown, New Jersey, is engaged in the operation of a medical facility providing inpatient medical care. Annually, Respondent derives gross revenue in excess of \$250,000 and purchases and receives at its Eatontown facility goods valued in excess of \$5000 directly from points outside the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization with the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since about 2001, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit:

All of Respondent's employees employed at its Eatontown facility, excluding all office clerical employees, sales employees, professional employees including registered nurses, licensed practical nurses, cooks, guards and supervisors as defined in the Act.

Respondent and the Union have been parties to successive collective-bargaining agreements, the most recent of which expired on November 1, 2005. The Respondent's answer admits paragraph 10 of the complaint which alleges, "On or about March 14, 2008, the Union and Respondent reached complete agreement on terms and conditions of employment of the unit to be incorporated in a collective-bargaining agreement."

B. The Negotiations

The negotiations for the successor agreement to the one expiring in 2005 took place from 2006 to 2007. Union Agent Ronald McCalla was assigned by the International to assist the Local in negotiations. Local Executive Vice President Clauvice St. Hilaire was the chief negotiator for the Union. The chief negotiator for Gateway Care Center was Neil Frank, Esq.

On February 15, 2007, the parties signed a memorandum of agreement for a contract with a term from February 15, 2007 to February 14, 2011. There is no dispute that this MOA represents the agreement between the Union and Respondent. The MOA consists of three pages handwritten by Frank which deal with wages, contributions to various union funds, and a new health insurance provision which replaced the Union health insurance fund.¹ The handwritten pages incorporate by reference certain paragraphs of a typed union proposal which is attached to and is a part of the MOA. Also attached to the MOA and a part of the agreed-upon contract, is a letter explaining the life insurance benefits and a two-page chart summarizing the provisions of the new United Health Plus policy to be provided by the employer. The MOA continued unchanged the terms of the previous collective-bargaining agreement except as modified by the agreement of February 15, 2007.

The MOA of February 15, 2007, was put into effect after the employees ratified the contract. The provisions relating to arbitration, union security, and checkoff were reinstated. The Union has not been aware of an instance of noncompliance with the terms of the MOA.

When the MOA was signed on February 15, 2007, the parties discussed the desirability of compiling a document that would pull together all the contract language from the various documents referred to in the MOA. Frank stated that his office would undertake this task, but after a 5-month period during which, Frank testified, he could not "get to it" St. Hilaire offered to have the contract typed. The Union then proceeded with the preparation of the written collective-bargaining agreement. The union representatives met with Frank on more than one occasion to go over and correct successive typed drafts of

the contract.² Eventually, St. Hilaire prepared a final draft and the parties met on March 14, 2008.

McCalla testified that he and St. Hilaire attended the March 14, 2008 meeting on behalf of the Union. Frank was there representing Respondent Gateway. According to McCalla, the parties went through the document page by page. Frank suggested that each party should initial each page to show that the page was approved. Frank made some changes to the document and these were approved by the Union. McCalla saw Frank and St. Hilaire initial each page of the document at the bottom of the page.

St. Hilaire testified that Frank made some changes to the draft; the paragraphs which were altered were initialed by the parties. St. Hilaire stated that he and Frank initialed the bottom of each page of the March 14 draft to signify the parties' agreement to that specific page.

Every page of the draft prepared by the Union and reviewed by the parties on March 14, 2008 is initialed at the bottom by both St. Hilaire and Frank. St. Hilaire generally initialed by writing his monogram as "CSH" and then the date written as "3/14/08." Frank used a number of methods in initialing the document. He most often wrote his monogram as "NF" and then the date "3/14/08." He made errors on some pages, writing the date as "3/4/08" or as "3/18/08." The handwritten changes to the March 14 document are all in Frank's hand. These changes were made by inserting words and phrases into the typed matter and/or crossing out typed matter. For the most part, the paragraphs where these corrections appear are initialed by Frank and St. Hilaire. In some cases only Frank initialed the changes. Also, Frank placed his initials next to some paragraphs where no changes were made in the typed document. In a few locations, Frank placed brackets around a sentence or two; the language in brackets was not crossed out or changed. Frank's initials and the date appear next to the brackets in some of these instances. Many pages of the document have no changes at all and the only handwriting on these pages consists of the initials and dates that Frank and St. Hilaire placed at the bottom.

At the instant hearing, Frank cross-examined McCalla at length with the apparent object of showing that the March 14, 2008 document was not an accurate transcription of the MOA of February 15, 2007. McCalla acknowledged that there is a typographical error on the March 14, 2008 document initialed by the parties. In article 15C, bereavement leave, the phrase was typed to read "the employee shall be entitled to three (4) days of paid leave." According to McCalla, the correct number is 3. Apparently Frank did not notice this typographical error when he and St. Hilaire initialed the bottom of page 18 on which this provision appears. McCalla explained that the two-page chart summarizing the benefits under the new employer-provided health insurance policy was not attached to the March 14, 2008 contract. It was never intended that this chart should be retyped; the chart would be duplicated and attached to the copies of the signed contract to be given to the members and to Respondent. The two pages comprising the United Health Plus

¹ Frank wrote in his hand the amount of the employer's contribution to the Alliance Fund, the Pension Fund, and the Training and Education Fund. He included a Legal Fund, but the Union no longer has such a fund.

² There were at least two such meetings and possibly a third between February 15, 2007, and March 14, 2008.

insurance had been initialed by Frank and St. Hilaire on February 15, 2007, when they executed the MOA. Respondent does not dispute the existence of an agreement relating to health insurance.

According to St. Hilaire, on March 14, 2008, Frank did not say that the agreement was contingent on his client's approval. Frank did not say that he needed his client's approval before signing the final copy of the contract. McCalla testified that on March 14, 2008, Frank never said that agreement had not been reached on all items in the initialed draft; Frank said nothing about the agreement being contingent on his client's approval.

Frank testified that on March 14, 2008, he told the Union that, "I could not sign the [entire agreement] and I had to take this back to my client." Frank also testified that he only agreed to those paragraphs where his initials appear. Frank could not explain why he did not initial some paragraphs where he had written in changes. In response to the question of what was meant by the fact that on March 14, he had initialed the bottom of each page of the document next to St. Hilaire's initials, Frank responded, "I don't know what it meant." Frank added, "[I]f that was a mistake, it was my mistake."

St. Hilaire testified that on March 14, 2008, Frank said it was not a good idea to sign the contract with all of the handwritten additions. He asked the Union to have a clean copy typed up. The parties agreed that the Union would have the agreement typed into a clean copy and they would sign the clean copy. After the contract was signed, the Union would print the contract for distribution to the members and provide the customary two copies to Respondent.

McCalla and St. Hilaire prepared a final clean copy of the March 14, 2008 collective-bargaining agreement. St. Hilaire testified that beginning in April 2008, he called Frank several times to arrange for a date to sign the contract but he did not receive a response to his requests.

On August 4, 2008, St. Hilaire sent a letter to Frank, enclosing a typed copy of the contract which incorporated the changes made by Frank on the March 14 document initialed by St. Hilaire and by Frank. St. Hilaire wrote:

I am writing to follow up the discussion that I had with your secretary on July 18, 2008 after she called me to cancel the meeting that [was] supposed to take place in NY so we could finalize the CBA for Gateway Health Care Center. . . . In order to make it easy, I send [sic] you two signed copies of the CBA. Can you sign both copies? Keep one for you and send one signed copy to the Union.

In the months following August 4, 2008, McCalla called Frank's office many times to arrange for signing the contract but he could not reach Frank. On November 19, 2008, McCalla wrote to Frank detailing the bargaining history and complaining that, "We have both a signed MOA and agreement on the full document yet we can't get the completed contract signed by Gateway management nor can we even speak with you to discover why we can't complete this work." McCalla closed by asking Frank to contact him.

Frank replied to McCalla on November 20, 2008 as follows:

I would like to meet with you to discuss a few concerns my client has with the Contract. In sum, some of the provisions

do not match the actual practice at the facility. My client would like these clarified.

On November 26, 2008, McCalla wrote to Frank stating:

[T]he Union will under no circumstances entertain renegotiation of any terms of our collective bargaining agreement. The CBA stands as is. However the Union would be willing to meet to help clarify the application of any provisions that Gateway management does not fully understand. In this regard please give us a list within ten days of the provisions that need clarification.

On December 12, 2008, Frank wrote to McCalla that he would send a list of his client's concerns by the next week, and he suggested a meeting on December 22 or 23. He asked that McCalla contact him to confirm the meeting.

McCalla never received the list promised by Frank. He called Frank's office on December 22, 2008, to ask that the list be faxed to him and he was told that the meeting dates Frank had earlier offered to the Union were not good.

The Union filed its charge in the instant proceeding on December 30, 2008.

Frank wrote to the Union on May 18, 2009, shortly before the date of the instant hearing. The letter cites some minor typographical errors in the typed contract sent to Respondent on August 4, 2008. The letter also states that Frank's handwriting has not been accurately typed in the "Duration" section of the contract. However, I have compared Frank's handwritten changes with the typed document and I find that the handwriting has been accurately rendered. Frank's letter says that a provision on minimum wage was omitted; however, it appears in article 10C of the typed contract.

It appears from Frank's May 18, 2009 letter and from Frank's testimony, that the contract initialed on March 14, 2008 did not include some language desired by Respondent concerning the computation of gross payroll for the purpose of calculating employer contributions to the various employee benefit funds.³ Frank testified that the gross payroll issue was not discussed on March 14, and there was no language on this subject in the draft initialed by the parties.⁴ Frank testified that he did not write anything in the contract on this subject and he said "that's the problem. There is supposed to be." Frank recalled that he became aware of the absence of the desired language in either October 2008 or January 2009, when his client raised the issue with him.

C. Discussion and Conclusions

I credit St. Hilaire and McCalla as to what was said and done at the March 14, 2008 meeting. I credit them that Frank did not say that his agreement was contingent on his client's approval.

³ The 2002-2005 contract, in the section entitled, "Health Benefits," had limited the definition of gross payroll so as to require employer contributions to the Welfare Fund based on straight time hourly rates. Benefits were excluded from the definition of gross payroll. The Respondent wanted this limitation to apply to contributions required by the 2007-2011 contract to the Pension Fund, the Training and Education Fund, and the Alliance Fund.

⁴ Frank could not recall if this issue was discussed during the 2007 negotiations leading up to the MOA of February 15, 2007.

I credit St. Hilaire and McCalla that the significance of Frank's and St. Hilaire's initials at the bottom of each page of the document was that both Frank and St. Hilaire had agreed to the provisions of the page as typed and as changed in Frank's own handwriting. I do not credit Frank's testimony about what he said at the March 14, 2008 meeting. I find that he said nothing about needing his client's approval. I find that Frank initialed the bottom of each page of the agreement, as he himself had suggested, to indicate that he agreed to the language on the page. I find that Frank's recollection about the meeting was confused and his testimony was at odds with his actions on March 14, 2008. The credible testimony and the documentary evidence convince me that Frank and the union representatives agreed on the final language of a contract on March 14, 2008 and that they signified their agreement by initialing each page of the draft after they had reviewed it.

I find that on March 14, 2008, Respondent and the Union agreed on the provisions of the collective-bargaining agreement for the period February 15, 2007, to February 14, 2011. St. Hilaire telephoned Frank several times beginning in April 2008, to arrange for execution of the contract but Frank did not respond to his calls. The Union sent a clean typed copy of the agreement to Frank on August 4, 2008, with a request that Respondent return a signed copy. Respondent did not sign the contract and it is clear that Respondent refuses to sign the contract. I find that Respondent unlawfully refused to execute the contract after a typed agreement was sent to Frank on August 4, 2008, with a request for a signature. *Miron & Sons Laundry*, 338 NLRB 5, 12 (2002).

Indeed, the above finding is consistent with and required by Respondent's answer herein. As stated above, Respondent's answer admits paragraph 10 of the complaint which asserts, "On or about March 14, 2008, the Union and Respondent reached complete agreement on terms and conditions of employment of the Unit to be incorporated in a collective-bargaining agreement."

CONCLUSIONS OF LAW

1. 1199 SEIU Healthcare Workers East, New Jersey Region is the exclusive collective-bargaining representative of the employees of Respondent Gateway Care Center in the following appropriate unit:

All of Respondent's employees employed at its Eatontown facility, excluding all office clerical employees, sales employees, professional employees including registered nurses, licensed practical nurses, cooks, guards and supervisors as defined in the Act.

2. Since August 4, 2008, by failing and refusing to execute the written collective-bargaining agreement agreed to by the parties on March 14, 2008, Respondent has violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found above that the parties agreed to the 2007–2011 collective-bargaining agreement as typed and corrected by hand and then initialed on March 14, 2008. I have found that the Union submitted a typed document incorporating the corrections on August 4, 2008. The Respondent must be ordered to execute the collective-bargaining agreement. The two-page chart summarizing the health insurance benefits provided through United Health Plus shall be attached to the August 4, 2008 typed document at signing.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Gateway Care Center, Eatontown, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to execute the written collective-bargaining agreement with 1199 SEIU HealthCare Workers East, New Jersey Region, agreed to by the Respondent and the Union on March 14, 2008, and submitted for signing on August 4, 2008.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the February 15, 2007–February 14, 2011 collective-bargaining agreement agreed to by the Respondent and the Union with the attached chart summarizing the health insurance provided through United Health Plus.

(b) Within 14 days after service by the Region, post at its facility in Eatontown, New Jersey, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 2008.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 28, 2009

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to sign the contract with 1199 SEIU Healthcare Workers East, New Jersey Region, for the term February 15, 2007 to February 14, 2011 for the following unit:

All of Respondent's employees employed at its Eatontown facility, excluding all office clerical employees, sales employees, professional employees including registered nurses, licensed practical nurses, cooks, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL SIGN the union contract.

GATEWAY CARE CENTER